92-564

No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

BONNIE BOERER,

Petitioner,

vs.

RONNA ZAKEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not this Court's decision in *Price Waterhouse v. Hopkins* is being correctly interpreted by the Second Circuit, which Court requires a plaintiff in a Title VII, mixed motive, pregnancy discrimination action to show that a discriminatory consideration merely "*played a part in the defendant's decision*"; or whether this Court intended that such a discriminatory reason be a "*significant*" or "*substantial motivating*" factor, resulting in the complained of termination, as presently held by the Fourth, Sixth, Seventh and D.C. Circuit Courts of Appeals.

2. Whether or not this Court's decision in *Price Waterhouse* permits a single "*stray remark in the work place*" between co-employees, to be attributed to the president of the corporation, so as to require the employer in a Title VII action to prove both that the company's employment decision was based on legitimate criteria and to further require that the president defend herself from individual liability.

LIST OF PARTIES

Bonnie Boerer, the petitioner herein, was the principal stockholder and chief corporate officer of Bonnie & Company Fashions , Inc ., a corporation that has since ceased doing business .

Ronna Zaken, the respondent herein and plaintiff below, was an employee of Bonnie & Company Fashions, Inc.

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No.

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BONNIE BOERER,

Petitioner,

vs.

RONNA ZAKEN,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Bonnie Boerer petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, *infra*, 3a-16a) reported as *Zaken v. Boerer*, __ F.2d __ (1992). The judgment of the District Court was rendered after a trial by jury (App. C, *infra*, 17a-19a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals (App. B, *infra*) was entered on June 1, 1992. The court denied a petition for rehearing on June 24, 1992 (App. A, *infra*, la-2a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*:

§ 2000e-2(a) Employer practices. It shall be an unlawful employment practice for an employer —

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

§ 2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes.

New York's Human Rights Law, N.Y. Exec. Law § 290 *et seq.* (McKinney 1982):

> § 296. Unlawful discriminatory practices.

> 1. It shall be an unlawful discriminatory practice:
>
> (a) For an employer or licensing agency, because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Federal Rule of Evidence 801(d)(2)(D) provides, in relevant part:

> A statement is not hearsay if —
>
> (2) Admission by party-opponent. The statement is offered against a party and is (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

Federal Rule of Evidence 403 provides, in relevant part:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time:
>
> Although relevant, evidence may be excluded if its probative value is substantially, outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

This case arises from a charge of pregnancy discrimination filed by Ronna Zaken after her employment of five (5) months was terminated by Bonnie & Company Fashions, Inc. in January of 1989.

Zaken initially filed on April 11th, 1989, a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") against both the company and the petitioner, Bonnie Boerer, individually and as owner of the company. Said charge was referred by the EEOC to the New York State Division of Human Rights. After 180 days had elapsed without a determination by the administrative agency, Zaken sought and received from the EEOC a notice of a right to sue on December 28th, 1989. Subsequent to her termination, the company closed its doors and ceased all operations and went out of business on December 31, 1989.

The within complaint was filed on January 12th, 1990 only against Bonnie Boerer, individually, alleging that as the primary stockholder and controlling person of the corporation, she violated Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, *et seq.*, and the New York Human Rights Law ("Human Rights Law"), Executive Law, § 290, *et seq.*

Jurisdiction of the Federal District Court was invoked pursuant to 42 U.S.C. § 2000e-5, 29 U.S.C.§ 1132, 28 U.S.C. § 1332 and 28 U.S.C.§ 1343(4), as well as the District Court's pendent jurisdiction over the respondent's state law claim.

The matter was tried before the United States District Court for the Southern District of New York and a jury of six from June 17th, 1991 to June 19th, 1991. During the course of its deliberations, the jury asked for and received from the court an

additional rereading of its charge pertaining to a determining factor and discriminatory motive as defined by this Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (App. D, *infra* at 20a-21a).

At the request of the jury and with the consent of both counsel, individual typed portions of the aforesaid jury charge were given to the jurors to have with them for the balance of their deliberations (App. D, *infra* at 21a).

By subsequent written request, the jurors asked for a definition of the term "motivating role" as used in the typed jury charge they had before them (App. E, *infra* at 22a). In response to the jury's specific question for a definition of "motivating role" the District Court instructed the jury that "motive is what prompts a person to act" (App. E, *infra* at 22a). Subsequently, the jury had sent out a sixth note requesting a rereading of the portion of Robin Weinberg's testimony (App. F, *infra* at 23a). Shortly after having the aforesaid portion of Weinberg's testimony reread, the jury returned to the courtroom with a unanimous verdict in favor of the petitioner, Bonnie Boerer. Adopting the jury's findings, the trial court ruled in defendant's favor on Zaken's Title VII cause of action. Judgment was accordingly entered for petitioner (App. C, *infra* at 17a-19a).

On July 15th, 1991, Zaken filed her appeal in the United States Court of Appeals for the Second Circuit. Oral argument was heard on the matter on November 4th, 1991 and a published decision was rendered on June 1, 1992. In its opinion, the Second Circuit Court of Appeals reversed the judgment rendered both by the jury on the state cause of action and by the trial judge on the Title VII action. The Court of Appeals held that the District Court had committed reversible error for two reasons:

(1) For not permitting the single hearsay statement made

between co-employees of the corporation to be admitted in evidence against Bonnie Boerer, individually, and

(2) For charging the jury that motivating role is "what prompts a person to act".

Essentially, the Court of Appeals, in its published opinion, stated as its first reason for reversal that the trial judge should have permitted the deposition testimony of Toni Barr, a co-employee, to have been read to the jury. Barr's hearsay testimony was to the effect that Ed Newman, the company's Vice President, told her that Robin Weinberg, a former sales manager, was fired because she was pregnant. The Court of Appeals reasoned that an agency relationship existed between Newman, an officer of the corporation, and Boerer individually, because she was the company's owner and principal officer (App. B, *infra* at 10a).

However, nowhere in its opinion does the court below address the relevancy of Barr's hearsay statement. That is, that the statement about Weinberg's firing is only relevant in Zaken's trial if the statement can be submitted to prove a "pattern or practice" of discrimination. The remark by Ed Newman made no reference to the termination of Ronna Zaken. Furthermore, the Circuit Court acknowledged in its opinion that the petitioner's company employed approximately 30 people in the New York City showroom, 24 of whom were women and five of whom had become pregnant during the course of their employment without loss of their positions (App. B, *infra* at 8a). Clearly, Barr's single hearsay statement, standing against the unrefuted testimony about the treatment of other pregnant women in the company does not demonstrate a "pattern or practice" of discrimination. Likewise, the opinion states that the petitioner had denied discriminating on the basis of pregnancy or making any derogatory remarks concerning any of her employees' pregnancies and further that Boerer insisted in her testimony that she fired Zaken because she

was not qualified as a sales manager (App. B, *infra* at 8a).

A petition for rehearing was filed on June 15th, 1992. It was pointed out to the Circuit Court in the petition for rehearing that, irregardless of the admissibility of the hearsay statement, the sole purpose for admitting the "Weinberg Statement" was to prove or demonstrate an alleged prior existing pattern or practice of discrimination against pregnant women. Likewise, the case law within the Second Circuit, up until the decision below was to the effect that one such alleged prior act does not constitute a pattern or practice. *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2nd Cir. 1984).

With regard to the second reason given by the Court of Appeals for the reversal of the judgment, *i.e.*, the trial court's definition of "motivating role", it was again argued to the Court of Appeals on the petition for rehearing that this Court's opinion in *Price Waterhouse* was to the effect that the plaintiff in a Title VII discrimination action must "show[s] that an impermissible motive played a *motivating part* in an adverse employment decision". (Emphasis supplied.) *Price Waterhouse*, 490 U.S. at 250, 104 L. Ed. 2d at 287, 109 S. Ct. 1775. Consequently, the trial judge's definition of "motivating role" was in accord with this Court's opinion, as well as the opinions of the Fourth, Sixth, Seventh, and D.C. Circuit Courts of Appeal in that the discriminatory consideration had to be a *significant or substantial motivating factor*. However, the Second Circuit below disagreed and has held instead that a plaintiff in a Title VII mixed motive case only has to prove that the discriminatory consideration merely "played a part in the defendant's decision." (App. B, *infra* at 15a). The petition for rehearing was denied by the Second Circuit on June 24, 1992.

REASONS FOR GRANTING THE WRIT

I.

THE REPORTED OPINION OF THE SECOND CIRCUIT COURT OF APPEALS, HEREIN, CONFLICTS WITH THE DECISION OF THIS COURT IN *PRICE WATERHOUSE* AND FURTHER IT IS IN CONFLICT WITH THE OPINIONS OF THE FOURTH, SIXTH, SEVENTH AND D.C. CIRCUIT COURTS OF APPEAL.

In its published decision below, the United States Court of Appeals for the Second Circuit holds that, in a mixed motive pregnancy discrimination, Title VII action, a plaintiff must merely demonstrate by a preponderance of the evidence that her pregnancy "*played a part* in the defendant's decision, then it (the jury) should find for plaintiff unless defendant demonstrated by a preponderance of the evidence that the same decision would have been made even if pregnancy had not been one of the factors contributing to it." (Emphasis supplied.) *Zaken v. Boerer*, __ F.2d at __ (2nd Cir. 1992) (App. B, *infra* at 15a).

Clearly, the opinion of the Second Circuit is that the impermissible or discriminatory reason need only be one of the reasons relied upon by the employer, rather than that it be a "substantial or motivating role" in the decision making process to terminate the employee. Certainly, the plurality decision by this Court in *Price Waterhouse*, requires a plaintiff to prove by a preponderance of the evidence that gender was a motivating role. Specifically, the language of the four Justices in *Price Waterhouse* was "that, once a plaintiff in a Title VII case shows that *gender played a motivating part* in an employment decision," then the burden shifts to the defense. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258, 104 L. Ed. 2d 268, 293, 109 S. Ct. 1775 (1989).

In separate concurrences, however, Justices White and

O'Connor agreed that in order for the burden to shift to the defendant, the plaintiff in a Title VII case must show that gender was a "substantial factor" in the employment decision in issue. *Id.*, 490 U.S. at 259-260, 278, 104 L. Ed. 2d at 293-294, 305, 109 S. Ct. 1775.

In a case involving discrimination in promotion by the Foreign Service on the basis of sex, the United States Court of Appeals for the District of Columbia held in 1990 that the District Court had to make a finding that "sex discrimination was a *substantial factor* in relevant promotions". *Palmer v. Baker* and *King v. Baker*, 905 F. 2d 1544, 1548 (D.C. Cir. 1990).

Similarly, the United States Court of Appeals for the Sixth Circuit found in an age discrimination case decided in May 1991 that prior to the shifting of the burden to the employer, the employee must first produce sufficient evidence that his age was a "significant motivating factor" in the employer's decision to eliminate his position. *Wilson v. Firestone Tire & Rubber Co.*, 932 F. 2d 510, 514 (6th Cir. 1991).

In 1989, in another case involving Firestone Tire & Rubber Co., the Seventh Circuit interpreted this Court's opinion in *Price Waterhouse* as requiring that a plaintiff must demonstrate that an illegitimate consideration was a "substantial factor" in the employment decision. *Smith v. Firestone Tire & Rubber Co.*, 875 F.2d 1325, 1330 (7th Cir. 1989).

Again, the Fourth Circuit, when faced with a racial discrimination action under Title VII, followed and quoted this Court's holding in *Price Waterhouse* in finding that the plaintiff therein had failed to meet its burden. Essentially, the Fourth Circuit held that "a plaintiff must prove by a preponderance of the evidence that the employer's motive to discriminate was a

substantial factor in the adverse personnel action against the plaintiff. The burden of persuasion then shifts to the employer to show by a preponderance of the evidence that, in the absence of the unlawful motive it would have reached the same result." *White v. Federal Exp. Corp.*, 939 F. 2d 157, 160 (4th Cir. 1991).

Furthermore, the Second Circuit's opinion below is silent about two important facts regarding the supplemental charge of the trial court in defining "motivating role". First, the trial judge below reread that portion of the charge pertaining to discrimination and what respondent must prove in order to prevail on her claim of pregnancy discrimination (App. D, *infra* at 20a-21a) and second, again pursuant to a request from the jury, the court provided to each juror a xerox copy of that portion of the charge that he had reread to them (App. D, *infra* at 20a-21a).

In the initial charge that was reread to the jury, as well as, in the copies of the typed charge given to the jury, the trial court instructed that pregnancy did not have to be "the only reason for the action taken by the defendant" and that there "may be other reasons for the termination" and finally "should you find that the plaintiff's pregnancy was one reason, and that the pregnancy played a *motivating role* in determining whether she was going to be discharged or paid a bonus, then you should find for the plaintiff." (App. D, *infra* at 20a-21a).

The employer is charged by this Court, upon the shifting of the burden, with demonstrating that its discriminatory reason did not motivate its act of terminating the employee. Clearly, this Court has stated that Title VII is violated when the "motivating role" or "substantial factor" is the illegal discriminatory reason over and above all other legitimate reasons. The illegitimate and legitimate reasons are not co-equal. It is the illegitimate reason that must be the *motivating* or *substantial factor* (*i.e.*, "what prompts a person to act") for the employer to have committed an illegitimate and

discriminatory act in violation of Title VII. However, this is no longer the standard as announced by the Court of Appeals for the Second Circuit. Today within the Second Circuit, the employee must merely demonstrate by a preponderance of the evidence that her pregnancy "played a part in the defendant's decision" in order to shift the burden to the employer (App. B, *infra* at 15a). There is no longer a requirement within the Second Circuit, that the discriminatory consideration be the "*motivating*" or "*substantial factor*" in the employer's decision to terminate the employee.

II.

CONTRARY TO THIS COURT'S HOLDING IN *PRICE WATERHOUSE*, THE SECOND CIRCUIT NOW PERMITS AN ISOLATED "*STRAY REMARK IN THE WORK PLACE*" BETWEEN CO-EMPLOYEES, TO BE ATTRIBUTED TO THE PRESIDENT OF THE CORPORATION SO AS TO REQUIRE THE EMPLOYER BOTH TO PROVE THAT THE COMPANY'S EMPLOYMENT DECISION WAS BASED ON LEGITIMATE CRITERIA AND TO FURTHER DEFEND THE PRESIDENT FROM INDIVIDUAL LIABILITY.

The remark in the deposition testimony of Toni Barr, a former employee of the company, was to the effect that Ed Newman, the company's Vice President told her that Robin Weinberg, a former employee, was fired because she was pregnant. Such a single isolated hearsay statement would only have relevance or admissibility in the trial of Zaken to show a prior pattern or practice of discrimination committed by the company against pregnant women.

In its decision, the Court of Appeals applied Fed. R. Evid. 801(d)(2)(D) and held that the hearsay statement fell within the hearsay exception as a statement against interest made by an agent.

The court below wrote that the statement attributed to Newman was made by him during the course of his employment as Vice President of Sales. Accordingly, the Court of Appeals was of the opinion that Newman, though an officer and agent of the company "was nonetheless answerable to Boerer who, as the company's principal owner, directed its operations and ultimately made all the final decisions." (App. B, *infra* at 10a). This alone, according to the court below, established a sufficient agency relationship between the declarant Newman and the petitioner Boerer for the purposes of admitting Barr's hearsay statement as against Boerer individually.

However, the only relevant purpose for admitting the statement would be an attempt by Zaken to prove or to demonstrate an alleged prior existing pattern or practice of discrimination committed by the company against pregnant women. Otherwise the statement about Weinberg's termination clearly has no relevance in an action against Boerer by Zaken for her own discharge from the company. Within the Second Circuit, the case law up until the decision below, was that one such alleged prior act does not constitute a pattern or practice. *Haskell v. Kaman Corp.*, 743 F.2d 113, 121 (2nd Cir. 1984). The Court of Appeals in *Haskell*, *supra*, found that the testimony of six former company officers concerning the circumstances of their own terminations and the terminations of other former company officers was permitted in error. Such testimony was inadmissible to show "pattern and practice" of the employer because the sample was not large enough to permit an inference that age was a determinative factor in the employer's decision. *Id.* In addition, the *Haskell* court found that the probative value of the testimony of the aforesaid officers was "substantially outweighed by the danger of unfair prejudice" and should have been excluded by the District Court pursuant to Fed. R. Evid. 403. *Id.* at 122.

Clearly the hearsay comment about Weinberg's termination is highly prejudicial to the petitioner and fundamentally unfair. We

must remember that the lawsuit below was brought by Zaken concerning her alleged termination for pregnancy. Assuming for a moment that the statement about Weinberg were true, how is it relevant to prove that the same cause operated against Zaken absent any evidence tending to show a pattern or practice.

In order to rebut the aforesaid testimony of Weinberg inferring a pattern and practice of discrimination, Boerer testified that during the existence of her company, she had employed women who had become pregnant and who were not terminated. Likewise, former employees who had retained their positions after pregnancy, testified on behalf of Boerer. The Court of Appeals noted in its opinion that approximately 30 people were employed in the company's New York City showroom and that 24 were women, five of whom became pregnant during the course of their employment without loss of their positions (App. B, *infra* at 8a).

Weinberg testified at trial that when she was initially interviewed for the position at Bonnie & Company Fashions, Inc., she was seen by Alan Kohn, together with Bonnie Boerer, who she claimed asked her about her marital status and whether she had any children. Further, Weinberg testified that supposedly Boerer at the conclusion of the interview, further commented that she hoped Weinberg would not have children while she was employed by the company (App. G, *infra* at 24a). However, Weinberg's testimony about this initial interview was entirely discredited when she was caught in a lie during her cross examination. The cross examination established the time of this alleged initial interview was late July or early August of 1987 (App. H, *infra* at 25a-26a). It was this crucial bit of evidence at the very end of their deliberations that the jury asked to have reread to them (App. F, *infra* at 23a). For, Boerer's passport marked in evidence, clearly established that at the time of the interview, in which she supposedly participated together with Kohn, she was in Hong Kong (App. I, *infra* at 27a). After hearing the testimony reread, the jury retired at 2:14 p.m. and

returned within eight minutes with its verdict at 2:22 p.m. (App. F, *infra* at 23a).

Clearly, the single isolated hearsay remark in the Barr Deposition was far outweighed by the other evidence presented to the jury and its admissibility was further precluded by its potential for prejudice and unfairness. The remark attempted to mask itself in the guise of "*a pattern or practice of discrimination*" when, in reality, it was nothing more than office rumor and hearsay about a single isolated incident that was not relevant to the matter before the court, the termination of Zaken. Accordingly, the trial court's ruling under Fed. R. Evid. 403 should have been affirmed by the Court of Appeals. The court below was required to look at the record as a whole in order to ascertain whether or not the trial judge committed an abuse of discretion. *United States v. Beech-Nut Nutrition Corp.*, 871 F. 2d 1181, 1193-1194 (2nd. Cir. 1989), *cert. denied*, 493 U.S. 933. The Court of Appeals "must give great deference to the trial judge who saw and heard the evidence" in that "the trial judge is in a superior position to evaluate the likely impact of the evidence". *Block v. R. H. Macy & Co., Inc.*, 712 F. 2d 1241, 1244 (8th Cir. 1983); *United States v. Carter*, 801 F. 2d 78, 83 (2nd. Cir. 1986), *cert. denied*, 489 U.S. 1012, 107 S. Ct. 657.

Justice O'Connor foresaw the harm that would be perpetrated by such a holding as presently published by the Second Circuit, herein, when she wrote in her concurring opinion in *Price Waterhouse* that "stray remarks in the workplace, while perhaps probative of sexual harassment, *see Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-69, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986), cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself, suffice to satisfy the plaintiff's burden in this regard." *Price Waterhouse v. Hopkins*, 490 U.S. at 277, 104 L. Ed 2d at 305, 109 S. Ct. 1775.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ANTHONY M. MAHONEY
MAHONEY & MAHONEY
Attorneys for Petitioner

APPENDIX A – ORDER DENYING REHEARING FILED JUNE 24, 1992

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No. 91-7696

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of June one thousand nine hundred and ninety -two.

Present:

Hon. Richard J. Cardamone,
Hon. Lawrence W. Pierce,
Hon. Roger J. Miner,

CIRCUIT JUDGES,

RONNA ZAKEN,

Plaintiff-Appellant,

V

BONNIE BOERER,

Defendant-Appellee.

Appendix A

A petition for rehearing having been filed herein by Defendant-Appellee, Bonnie Boerer.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Elaine B. Goldsmith

by: s/ Carolyn Clark [illegible]

Chief Deputy Clerk

APPENDIX B – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED JUNE 1, 1992

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 461 – August Term 1991

(Argued November 4, 1991 Decided June 1, 1992)

Docket No. 91-7696

RONNA ZAKEN

v. *Plaintiff-Appellant*,

BONNIE BOERER

Defendant-Appellee.

Before:

CARDAMONE, PIERCE, and MINER
Circuit Judges

Ronna Zaken appeals from a June 19, 1991 judgment of the United States District Court for the Southern District of New York (Gagliardi, J.), after a jury trial, in favor of defendant Bonnie Boerer, on her claims of pregnancy discrimination under New York's Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* (McKinney 1982), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.*

Reversed and remanded for a new trial.

VICTORIA de TOLEDO, Stamford, Connecticut (Michelle de Garmeaulx, Casper & de Toledo, Stamford, Connecticut, of counsel), *for Appellant*.

ANTHONY M. MAHONEY, Westfield, New Jersey (Teresa A. Kazista, Mahoney & Mahoney, Westfield, New Jersey, of counsel), *for Appellee*.

CARDAMONE, *Circuit Judge*:

Ronna Zaken brought the present suit against defendant Bonnie Boerer, owner of the now defunct Bonnie Boerer & Company, alleging that she was denied a bonus and her employment was terminated because she was pregnant, in violation of New York's Human Rights Law, N.Y. Exec. Law §§ 290 *et seq*. (McKinney 1982) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*. Following a jury trial her state law claims were submitted to the jury, which found in favor of the employer defendant. Adopting the jury's findings, the trial court ruled in defendant's favor on Zaken's Title VII cause of action. Judgment was accordingly entered for defendant.

On appeal appellant Zaken challenges as error the district court's adverse judgment on three grounds: the refusal to admit the deposition testimony of Toni Barr, a co-employee, that she was told plaintiff's predecessor, Robin Weinberg, was terminated because she was pregnant and that plaintiff was fired for the same reason; the limitation of appellant's testimony regarding "daily sheets" that

reflected her job performance as a sales manager; and the supplemental charge that purported to define the term "motivating role."

BACKGROUND

Defendant Bonnie Boerer was the chief executive officer of Bonnie Boerer & Company and the owner of 98 percent of its stock. The company — which defendant had owned since 1983 — designed, produced and sold women's specialty clothing. Bonnie Boerer herself designed the clothes that were manufactured by her Hong Kong corporation and sold through her New York City showroom, where plaintiff was employed. During its existence, defendant Boerer individually controlled almost every aspect of her business. In addition to design and production, she handled advertising and finances. She had ultimate decisionmaking power with respect to all corporate activities, including personnel decisions. Boerer made the final decision to terminate appellant's employment.

Appellant Ronna Zaken was hired in September 1988 as a sales manager of the company's large size clothing division in the company's New York office at a salary of $46,000 per year, with the promise of a bonus at the end of 1988. As a sales manager, Zaken was responsible for selling large size clothing to various department and retail clothing stores, and supervised two salespeople in her division as well as three road salespersons. Unbeknownst to appellant when she was hired, she replaced Robin Weinberg, the former sales manager of the same division, who had been discharged during the fifth month of her pregnancy.

Shortly after beginning her employment in September, Zaken

learned that she was pregnant, and advised Alan Kohn of that fact in October. Kohn was plaintiff's supervisor and president of sales for the company's entire product line. Appellant planned to continue to work for as long as possible during her pregnancy, and then return to her position soon after her delivery. Kohn told plaintiff not to tell Boerer or anyone else at the company that she was pregnant, and suggested it would be best if he broke the news to defendant at a later time.

At the end of December 1988 Boerer — who had been in the Orient overseeing the manufacture of her product line since plaintiff's hire in September — returned to the New York office and became aware of plaintiff's pregnancy. While overseas defendant had been kept apprised of the performance of her sales staff through "daily sheets" detailing each employees' sales activities. When at the end of 1988 Zaken was not given her previously promised bonus, she asked Sanford Sessler, who had succeeded Alan Kohn in November as her supervisor and was then serving as the company's vice president of sales, why she had not received the bonus. Sessler told her that Boerer had decided she was "not qualified" for her sales position. Plaintiff testified that when she told Sessler that she believed defendant was discriminating against her because of her pregnancy, he replied "it doesn't help."

A month later, on January 24, 1989, Sessler advised plaintiff that defendant had made the decision to terminate her employment. Plaintiff was then five months pregnant, and upon inquiring why she was being fired, was told by Sessler that defendant had decided she was "not qualified" as a sales manager. Zaken testified that Sessler also told her he had fought to convince defendant not to fire her and that he would give her a recommendation letter. On February 13, 1989 he did so, stating that Zaken's "administrative

skills, attention to detail, work ethics and ability to communicate were outstanding."

At trial plaintiff testified regarding her performance as a sales manager, and introduced the daily records upon which defendant had relied in judging her performance. She was allowed to explain the significance of many of the notations on these documents, but this testimony was ultimately limited by the trial court, which ruled that the daily sheets were going to the jury in their entirety and that further testimony detailing the information in them was therefore unnecessary.

Plaintiff's predecessor, Robin Weinberg, also testified at trial. She stated that she had been discharged by defendant Boerer when she was five months pregnant after being employed a little over one year. She declared that she had a very good sales record at the time of her termination and prior to becoming pregnant, had received very positive comments from Boerer. Weinberg had received a Christmas bonus after working at the company only five months, and a raise after eight months with the company. She testified that after discovering her pregnancy, Boerer became cold and hostile, and terminated her employment a few months later. She also stated that at the time of her hiring interview, Boerer had asked whether she planned to have children, and stated that she hoped Weinberg would not become pregnant while employed at her company.

Plaintiff also sought to introduce the deposition testimony of Toni Barr, a former salesperson of defendant's. At her deposition, Barr had testified that Ed Newman, the company's then vice president of sales, told her that Robin Weinberg had been fired by the defendant because she was pregnant. In addition, Barr testified that she was told plaintiff was also terminated because of her

pregnancy, but Barr did not identify the individual who made this statement. The trial judge refused to admit this deposition testimony, finding that it was not admissible against defendant in her individual capacity and that it was cumulative.

Bonnie Boerer insisted in her testimony that she fired plaintiff because she was not qualified to fill the position of sales manager. She stated further that Robin Weinberg had been terminated because of excessive absenteeism, low productivity, and dishonesty. In addition, testimony was introduced that of the approximately 30 people employed in the company's New York City showroom 24 were women, five of whom became pregnant during the course of their employment without loss of their positions. Defendant denied discriminating on the basis of pregnancy or making any derogatory remarks concerning any of her employees' pregnancies.

The district court submitted plaintiff's New York Human Rights Law cause of action to the jury, asking it to determine whether plaintiff's pregnancy was a determining factor in defendant's decision not to pay plaintiff a bonus and/or to terminate her employment. During its deliberations, the jury made several requests, including a request for the definition of "motivating role." The district court, over objection, instructed the jury that "[m]otive is what prompts a person to act." The jury returned a verdict in favor of defendant. The district court adopted the jury's finding that plaintiff had not shown by a preponderance of the evidence that pregnancy was a determining factor in defendant's decisions, and ruled in favor of defendant on plaintiff's Title VII cause of action.

Appendix B

DISCUSSION

I

We consider first the deposition testimony of Toni Barr respecting statements made to her concerning appellant's and Robin Weinberg's discharge from defendant's employ. Zaken argues these statements were admissible against defendant under Fed. R. Evid. 801(d)(2)(D). The trial court believed they were inadmissible against defendant Boerer in her individual capacity and in any event cumulative.

Rule 801(d)(2)(D) provides in relevant part:

> A statement is not hearsay if [it] is offered against a party and is [made] by the party's agent or servant concerning a matter within the scope of the agency or employment . . . during the existence of the relationship.

Considering first whether the statements were admissible against Boerer in her individual capacity, we observe that when a statement made by one corporate employee to another is sought to be introduced against a corporate employee, instead of the corporation, admission under Rule 801(d)(2)(D) depends on the relationship between the declarant and the defendant. *See United States v. Young*, 736 F.2d 565, 567 (10th Cir. 1983) (per curiam), *rev'd on other grounds*, 470 U.S. 1 (1985). When the factors proving an agency relationship are present, the testimony should not be excluded simply because it is offered against a corporate employee rather than the company itself. *See United States v. Paxson*, 861 F.2d 730, 734 (D.C. Cir. 1988); *United States v. Draiman*, 784 F.2d 248, 256-57 (7th Cir. 1986).

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We examine therefore each statement testified to at Barr's deposition to determine whether the requisite relationship existed between the declarant and Boerer to make the statement admissible against Boerer in her individual capacity. With regard to Barr's testimony that Ed Newman — the company's then vice president of sales — told her that Robin Weinberg was fired because she was pregnant, the necessary relationship exists between Newman and Boerer. Newman, though an officer of the company, was nonetheless answerable to Boerer who, as the company's principal owner, directed its operations and ultimately made all the final decisions. In essence, Newman was directly responsible to Boerer. This sufficiently establishes an agency relationship between the declarant Newman and the defendant Boerer for purposes of admitting Barr's statement under Rule 801(d)(2)(D) against Boerer in her individual capacity.

Further, the statement attributed to Newman concerned a matter within the scope of his agency. He had ostensible authority over and took part in personnel decisions regarding hiring and firing of sales staff. The statement attributed to him was made during the course of his employment as vice president of sales. Appellee's contention that the statement was not admissible against her because Newman later left the company in a type of "bloodless coup" is unavailing. That Newman later left the company, the circumstances surrounding his departure, and whether he may have been plotting against the company at the time the statement was made, would go to the weight of the evidence, not its admissibility. Thus, Newman's statement that Robin Weinberg was fired because of her pregnancy was admissible against defendant under Rule 801(d)(2)(D).

The other basis for the trial court's exclusion of the statement,

as cumulative under Fed. R. Evid. 403, is one with which we are also unable to agree. Rule 403 grants a trial court broad discretion to exclude evidence when its probative value is substantially outweighed because admission would result in the needless presentation of repetitious proof. *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1193 (2d Cir.), *cert. denied*, 493 U.S. 933 (1989). Here appellant presented only three witnesses at trial, none of whom testified to Newman's statement, which provided direct evidence that pregnancy played a role in defendant's employment decisions. Moreover, Barr's statement was the only evidence presented by an objective witness, as both appellant and Weinberg had sued defendant. While plaintiff may not be entitled to introduce several successive witnesses — each with greater indicia of credibility — to testify to the same statement, such is not the case here. Hence, we conclude that it was an abuse of discretion to deny admission to Barr's testimony concerning the reason for the termination of plaintiff's predecessor.

In contrast, Barr's testimony that she was told appellant was fired for "the same reason as [Weinberg]" was not attributed to a specific individual, and thus was evidence properly excluded by the district court. Appellant contends that the context of Barr's testimony provides a basis to conclude that the declarant was Sessler, who had succeeded Newman as vice president of sales. Although this contention is not implausible, our review of the record does not persuade us that the statement may properly be attributed to Sessler.

Zaken's reliance on *United States v. Cruz*, 910 F.2d 1072 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 709 (1991), for the proposition that the unidentifiability of the declarant is immaterial to the admissibility of this testimony is misplaced. In *Cruz*, the court

found that the unidentified declarant was a coconspirator of the defendant, and this relationship rendered the statement admissible under Fed. R. Evid. 801(d)(2)(E) without further identification. *Id.* at 1082-83. But the distinction between the foundation required for the admissibility of a statement of a coconspirator under Rule 801(d)(2)(E) and that of an agent under Rule 801(d)(2)(D) was explicitly recognized. Distinguishing *Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996 (3d Cir. 1988), a case involving Rule 801(d)(2)(D), the *Cruz* court stated that

> [u]nlike the case at bar . . . the identity of that declarant was critical because without knowing who she was or when she stated that she or the company wanted someone younger, the court could not determine if the statement was made by an agent, concerning the scope of the agency, and during the agency.

910 F.2d at 1081 n.10.

Here, without identification of the declarant, the statement concerning the reason for Zaken's termination did not have a sufficient evidentiary foundation to establish the existence of an agency relationship as required under Rule 801(d)(2)(D). Hence, this portion of the deposition sought to be introduced as an admission by a party opponent was properly excluded. *See Carden*, 850 F.2d at 1002; *Cedeck v. Hamiltonian Fed. Sav. and Loan Ass'n*, 551 F.2d 1136, 1138 (8th Cir. 1977).

II

Appellant also challenges the evidentiary ruling that limited

her testimony regarding the "daily sheets." This ruling is reviewed under an abuse of discretion standard. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1376 (2d Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990). Zaken was permitted to explain various entries on 12 of the "daily sheets" on which her work activities were recorded. Her counsel indicated that plaintiff would explain, for the benefit of the jury, only those daily sheets that were difficult to interpret. During the course of her testimony plaintiff was permitted to explain many abbreviations and figures, and to expound as to the significance of this evidence as it related to her effectiveness as a sales manager. The daily sheets were received in evidence in their entirety, and made available to the jury during its deliberations.

The district court eventually cut short this line of testimony, stating that "As I understand your case, you need to prove that she was pregnant and that's the reason she was discharged. The other end of it is up to the defendant if they have anything to show with respect to that. We're getting ahead of that." The trial court apparently believed such extensive testimony regarding plaintiff's qualifications as a sales manager was unnecessary as part of her *prima facie* case of discrimination.

While we might reach a different conclusion if the "daily sheets" were excluded from evidence or if all testimony necessary to explain the significance of the daily sheets had been disallowed, we do not think the district court abused its discretion in limiting Zaken's testimony, particularly because these records were received and available to the jury in their entirety, and because appellant was allowed to explain the significance of the abbreviations and figures on many of them. The trial record discloses that Zaken's testimony went well beyond explaining

those notations that were difficult to interpret, and at the point this testimony was halted she was largely reiterating previous explanations.

III

The remaining issue raised challenges the trial judge's supplemental charge. As part of its initial charge, the district court instructed the jury that if it found plaintiff's pregnancy played a motivating role in defendant's decisions, the jury should find in favor of plaintiff, while if defendant had legitimate nondiscriminatory reasons so that pregnancy was not a motivating factor, then they should find for defendant. During its deliberations, the jury requested the court to define "motivating role." Over objection, the district court gave the following supplemental instruction: "[w]ith respect to the court's explanation of the words motivating role, I feel tht a definition of motive is sufficient for me to give to you. Motive is what prompts a person to act. Motive is what prompts a person to act." This was error.

The Supreme Court instructs that "[i]n saying that [pregnancy] played a motivating part in an employment decision, we mean that, if we ask the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was [pregnant]." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (plurality opinion). A plaintiff is not required "to identify the precise casual role played by legitimate and illegitimate motivations in the employment decision she challenges." *Id.* at 241. Instead, she need only "prove that the employer relied upon sex-based considerations in coming to its decision." *Id.* at 242.

Appendix B

The trial court's definition of motivating role as "what prompts a person to act" was wrong insofar as it failed to explain to the jury that plaintiff need not show pregnancy was the primary reason for defendant's decisions to discharge plaintiff and deny her a bonus, but only that it was a factor relied upon by defendant. Moreover, the trial court's supplemental charge could have been interpreted to require that pregnancy had to be *the* factor that "prompted" the defendant to deny plaintiff a bonus and terminate her employment, rather than simply *a* factor that made a difference in these decisions. *See Paolillo v. Dresser Indus., Inc.*, 865 F.2d 37, 40 (in age discrimination action instruction that jury must find that " 'the real reason for the decision was the plaintiff's age' " constituted reversible error), *modified*, 884, F.2d 707 (2d Cir. 1989). Given that nowhere in the district court's charge was the term "motivating role" correctly defined, we are not persuaded that the supplemental instruction on this issue had no effect on the jury. In fact, the opposite conclusion is one more likely to be the case. *See Arroyo v. Jones*, 685 F.2d 35, 39-40 (2d Cir.), *cert. denied*, 459 U.S. 1048 (1982).

In short, the jury should have been instructed that if it found plaintiff had demonstrated by a preponderance of the evidence that her pregnancy played a part in defendant's decision, then it should find for plaintiff unless defendant demonstrated by a preponderance of the evidence that the same decision would have been made even if pregnancy had not been one of the factors contributing to it. *See Price Waterhouse*, 490 U.S. at 244-45. *See also Kump v. Xyvision, Inc.*, 733 F. Supp. 554, 561-62 (E.D.N.Y. 1990) (applying similar standard to pregnancy discrimination claim under New York's Human Rights Law). The trial court's instruction erroneously failed to delineate clearly each party's burden in this case.

Appendix B

CONCLUSION

Accordingly, the judgment of the district court is reversed and the case remanded to it for a new trial consistent with this opinion.

APPENDIX C - JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 19, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

90 CIVIL 0193(LPG)

Ronna Zaken,

Plaintiff

-against-

Bonnie Boerer,

Defendant

JUDGMENT

The issues in the above entitled action having been brought on for trial before the Honorable Lee P. Gagliardi, Senior United States District Judge with a jury on June 4, 1991, and at the conclusion of the trial, the jury having answered the attached special verdict form, and the jury in so doing having returned a verdict in favor of the defendant on claims pursuant to the New York Human Rights Law, Executive Law Section 290 *et. seq.*, and the Court thereafter dismissed the claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e *et seq.*

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed as against the defendant.

Appendix C

DATED: White Plains, N.Y.
June 19, 1991

s/ Joseph F. Cloidt
Acting Clerk

APPROVED:
s/ Lee P. Gagliardi
U.S.D.J.

Appendix C

Form of Verdict

1. Has the plaintiff proven by a preponderance of the evidence that her pregnancy was a determining factor in the defendant's decision to terminate the plaintiff.

No.

2. Has the plaintiff proven by a preponderance of the evidence that her pregnancy was a determining factor in the defendant's decision not to pay the plaintiff a bonus.

No.

s/ illegible
Foreperson

6/19/91
Date

APPENDIX D — RELEVANT PORTION OF JURY CHARGE

[T394-18 to T396-20, June 18, 1991]

THE COURT: Your note reads "We are having a problem distinguishing the difference between a factor and a determining factor in the questions on the jury form of verdict. Can we please review what the judge told us about the rules for answering those questions, how much a portion of evidence must be to be a determining factor."

I'll read those to you.

The plaintiff Ronna Zaken contends that she was unlawfully terminated and wrongfully denied compensation in that her pregnancy was a determining factor in the decision to terminate her, not to pay her a bonus. The defendant Bonnie Boerer denies that the plaintiff's pregnancy played any part in the decision to terminate the plaintiff or to pay the plaintiff a bonus because she had valid business reasons for her actions.

Under provisions of law, it is unlawful for an employer to discharge or otherwise discriminate against an employee because of her pregnancy. In order to prevail on her claim, the plaintiff must prove by a preponderance of the evidence that her pregnancy was a determining factor in the defendant's decision to discharge the plaintiff or not to pay her a bonus.

When I say that the plaintiff must prove that her pregnancy was a determining factor in the defendant's decision, I do not mean that the plaintiff has to establish that her pregnancy was the only reason for the action taken by the defendant. There may be other reasons for her termination or denial of the bonus.

Appendix D

However, if you find that the plaintiff's pregnancy was one reason and that her pregnancy played a motivating role in determining whether she was going to be discharged or paid a bonus, then you should find for the plaintiff.

On the other hand, if you find that the defendant had legitimate, nondiscriminatory reasons for her actions, so that pregnancy was not a motivating factor, then you must find for the defendant.

In this respect you are instructed that you are not to consider the wisdom or reasonableness of any business decision by the defendant. It is enough that the defendant's actions be based upon factors other then pregnancy.

However, the defendant cannot avoid liability by offering a reason or reasons for the termination and denial of a bonus that did not motivate the defendant at the time.

Does that respond to your question? All right.

JUROR SIX: Judge, could we have a copy of that?

THE COURT: Any objection to my sending this to the jury?

MS. de TOLEDO: No, your Honor.

MR. MAHONEY: No, your Honor.

THE COURT: We'll send you six copies. We'll send them into you momentarily.

APPENDIX E —JURY'S NOTE ON MOTIVATING ROLE

[T403-9 to 25, June 18, 1991]

THE COURT: Sorry for the delay in getting back to you, but this courtroom was otherwise occupied and I couldn't get here.

Your note reads "Could we please have a dictionary and the court's explanation of the words motivating role."

I cannot furnish you with a dictionary, not that we don't have one but our higher courts, the appellate courts have indicated that this is a matter that we should not pursue, an act that we should not do, send a dictionary into the jury so I can't send that in.

With respect to the court's explanation of the words motivating role, I feel that a definition of motive is sufficient for me to give to you. Motive is what prompts a person to act. Motive is what prompts a person to act.

And I think that is the best explanation I can give you in referring to the words motivating role.

APPENDIX F — JURY'S NOTE ON ROBIN WEINBERG

[T404-17 to T405-7, June 18, 1991]

(Jury present)

THE COURT: Recent note, we would like to have the remainder of Robin Weinberg's testimony after the point at which the reference to the third week of July was mentioned. We'll have that read to you.

(Record read)

THE COURT: All right. Is that what you want?

JUROR SIX: Yes.

THE COURT: You may retire and continue deliberations.

(Deliberations continue; 2:14 p.m.)

(Jury present; 2:22 p.m.)

THE COURT: I have a note that you have reached a verdict.

THE CLERK: Has the jury reached a verdict?

JUROR SIX: Yes, we have.

APPENDIX G — EXCERPTS OF TRANSCRIPT OF TESTIMONY

[T184-15 to T185-4, June 17, 1991]

WEINBERG (DIRECT)

Q. Had Ms. Boerer said anything to you about having children at the time that you interviewed with her?

A. Yes. She had asked me my marital status and she also asked me if I had any children.

Q. And what did you say in response to that?

A. I was kind of surprised that she asked those questions —

THE COURT: What did you say?

A. I answered positively, I said, yes, I was married and no, I did not have any children.

Q. Did she say anything else with respect to children?

A. She asked me if I expected on having childen in the near future and I said, yes, and she says, "Well, I hope it's not while you're employed by me."

APPENDIX H — EXCERPTS OF TRANSCRIPT OF TESTIMONY

[T206-1 to 14, T206-25 to T207-5 and T208-3 to 14, June 17, 1991]

WEINBERG (CROSS)

Q. What was the date of that?

A. Probably the third week in July, right before I was hired.

Q. What year?

A. 1987.

Q. And where did she say that to you?

A. In her office, while she was preparing for the Dallas show, to have the Dallas Cheerleaders there. It was a big promotion.

Q. And that would be in July 1987?

A. Yes, it was.

Q. Now, you're sure she was there?

A. The end of July, the beginning of August. Right before my employment began, yes . . . .

Q. And you're sure that Ms. Boerer was there?

A. Yes. She was the one who approved my employment, sitting there with Ed Kohn, I'm sorry with Alan Kohn. And at the

same time she was all excited about the fact they they were winning the Dallas fashion award and we were looking at pictures of Dallas Cowboy Cheerleaders. . . .

A. I didn't say the entire month of July. I said before and I'll say it again, the end of July, the beginning of August.

Q. Just give me an outside date?

A. I don't have one. I just gave you what I know.

Q. Well, normally when I say the end of the month, and this could differ—

THE COURT: Is it as early as July 25th to August 5th? That's what he's asking for.

A. I believe it was later than July 25th. Maybe it was the last day of the month. If not it was the beginning of August.

APPENDIX I — EXCERPTS OF TRANSCRIPT OF TESTIMONY

[T244-9 to T245-1]

BOERER (DIRECT)

A. I left the country on July 25th, which was a Saturday. And normal preparation for a trip of this nature would —

THE COURT: You left on the 25th of July.

THE WITNESS: But I had to prepare.

Q. When did you arrive in Hong Kong?

A. The 26th of July.

Q. Is it stamped that you arrived on the 26th? (Referring to Boerer's Passport marked as Exhibit F in evidence.)

A. Yes.

Q. What year?

A. 1987.

Q. What year?

A. 1987.

Q. And when did —

A. This is Weinberg's, 1987.

Appendix I

Q. That's right. I'm sorry. And when did you return from Hong Kong?

A. August 27, 1987. . . . .